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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JAMES C. KELLEY,

Plaintiff,

v.

DR. KAREN GEDNEY, *et. al.*,

Defendants.

Case No. 3:16-cv-00041-MMD-WGC

ORDER REGARDING REPORT AND
RECOMMENDATION OF
MAGISTRATE JUDGE
WILLIAM G. COBB

I. SUMMARY

Before the Court is the Report and Recommendation of United States Magistrate Judge William G. Cobb (“R&R”) (ECF No. 44), recommending granting Defendants’ motion to dismiss/motion for summary judgment (“Motions”) (ECF Nos. 23, 24) based on Plaintiff’s failure to exhaust his administrative remedies. The Court has reviewed Plaintiff’s objection (ECF No. 45) and Defendants’ response (ECF No. 46). For the reasons discussed herein, the Court adopts the R&R.

II. BACKGROUND

After screening pursuant to 28 U.S.C. § 1915A, the Court permitted Plaintiff to proceed on his Eighth Amendment claim based on his allegations that Defendants have deliberately denied or interfered with him receiving proper treatment of two serious medical conditions—an umbilical hernia and hepatitis C. (ECF No. 11.)

As relevant to Defendant’s Motion, the facts relating to Plaintiff’s grievance filings are not in dispute. Administrative Regulation (“AR”) 740 establishes NDOC’s grievance process with the various steps—informal level, first level and second level—set out in AR

1 740.05 through 740.07. (ECF No. 23-8 at 5-9.) AR 740.09.2.F provides, in pertinent part,
2 that “[i]t is considered an abuse of the inmate grievance procedure when an inmate files
3 a grievance that . . . contains two more appropriate issues.” (*Id.* at 11.) AR 740.09.4
4 provides that the event of such an abuse, “[t]he inmate shall not be given additional time
5 to re-submit the grievance in proper form.” (*Id.*) AR 740.05.4.A gives an inmate six
6 months to file a grievance concerning a medical claim. (*Id.* at 6.)

7 On June 9, 2015, Plaintiff submitted grievance number 2006302478 at the
8 informal grievance level where he requested surgery for his hernia and Hepatitis C
9 treatment pill:

10 Around the last week of May 2015 I was seen at NNCC’s RMF by RN
11 Manalang regarding my medical kite requesting surgical treatment for my
12 hernia and the new hepatitis C pill treatment available to inmates at NNCC.
13 RN Manalang ordered a blood test be done for my Hep C, and referred that
14 I see Dr. King (NDOC’s surgical contractor medical specialist) for surgical
15 treatment for my stomach hernia. Meanwhile, my blood test came back
16 indicating that I have Hep-C. On June 4, 2015 I was seen by Dr. Gedney
17 who said I was to die of cigarette related symptoms before I would Hep-C,
18 and basically refused to refer surgery to NNCC’s Utilization Review Panel
19 or provide the Hep-C treatment pill that would not only prolong my life span
20 but prevent any [] Hep-C transfer to other inmates. On June 8, 2015, I was
21 scheduled to see Dr. King and when I went to the RMF to see him, I was
22 stopped and informed by RN Mellissa-in front of Dr. King, Dr. Gedney
23 cancelled my appointment with Dr. King. I am being denied adequate
24 medical care for my serious medical need of hernia surgery and Hep-C
25 treatment that is available to inmates at NNCC, thus my Eighth
26 Amendment right to adequate medical care is being violated by Dr.
27 Gedney.

20 (ECF No. 23-1 at 2.) He received a response, denying his grievance, as follows:

21 Mr. Kelley, per Medical Directive #219 you do not meet the criteria for
22 Hepatitis C treatment at this time. Per the physician[']s notes, your
23 Hepatitis C should be monitored every year, and that no treatment is
24 needed at this time. Per physician[']s notes, you have a small umbilical
25 hernia, and surgery at this time would be elective. Elective surgeries are
26 not performed by the NDOC.

25 (*Id.*) Plaintiff filed a first level grievance dated June 30, 2015, explaining his
26 disagreement. (*Id.*) In response, Plaintiff received a document entitled “Nevada
27 Department of Corrections Memorandum” (“Memo”) dated July 7, 2015. (ECF No. 37 at

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52.) The Memo notified Plaintiff that his “grievance is being returned to [him] for the following reason(s):

Per AR 740.09 2 F, “It is considered abuse of the inmate grievance procedure when an inmate files a grievance that ... contains two or more appropriate issues.” Your grievance involves both Hep C treatment and hernia surgery. Please split this into two separate grievances.

(*Id.*; ECF No. 23-1 at 2.) The bottom of the Memo included boilerplate instructions: “You may resubmit your grievance after correcting the above deficiencies. Failure to re-submit the grievance through the prescribed timeframe shall constitute abandonment.” (ECF No. 37 at 52.) Plaintiff then filed a second level grievance, voicing his disagreement with the Memo. (ECF No. 23-1 at 3; ECF No. 37 at 54-62.) On August 20, 2015, Plaintiff’s second level grievance was rejected; and he was again told to “split this into two separate grievances.” (ECF No. 23-1 at 3.) Thus, while Plaintiff received a response on the merits to his grievance at the informal grievance level, his first and second level grievance was rejected on procedural ground—the inclusion of two issues in violation of AR 740.09.2.F.

Defendants’ Motions seek dismissal of Plaintiff’s claim for failure to exhaust administrative remedies. (ECF Nos. 23, 24.) The Magistrate Judge agrees with Defendants and recommends dismissal of Plaintiff’s claim with prejudice because the time for him to pursue his administrative remedies has expired. (ECF No. 44 at 18.)

III. LEGAL STANDARD

A. Review of the Magistrate Judge’s Recommendations

This Court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). Where a party timely objects to a magistrate judge’s report and recommendation, then the court is required to “make a *de novo* determination of those portions of the [report and

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1 recommendation] to which objection is made.”¹ 28 U.S.C. § 636(b)(1). In light of
2 Plaintiffs’ objection, the Court has engaged in a *de novo* review to determine whether to
3 adopt Magistrate Judge Cobb’s recommendation.

4 **B. Summary Judgment Standard**

5 “The purpose of summary judgment is to avoid unnecessary trials when there is
6 no dispute as to the facts before the court.” *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*,
7 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when the
8 pleadings, the discovery and disclosure materials on file, and any affidavits “show there
9 is no genuine issue as to any material fact and that the movant is entitled to judgment as
10 a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). An issue is
11 “genuine” if there is a sufficient evidentiary basis on which a reasonable fact-finder could
12 find for the nonmoving party and a dispute is “material” if it could affect the outcome of
13 the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49
14 (1986). In evaluating a summary judgment motion, a court views all facts and draws all
15 inferences in the light most favorable to the nonmoving party. *Kaiser Cement Corp. v.*
16 *Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). “The mere existence of a
17 scintilla of evidence in support of the plaintiff’s position will be insufficient.” *Anderson*,
18 477 U.S. at 252.

19 **IV. DISCUSSION**

20 The Prison Litigation Reform Act (“PLRA”) provides that “[n]o action shall be
21 brought with respect to prison conditions under section 1983 . . . by a prisoner
22 confined in any jail, prison, or other correctional facility until such administrative
23 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). The Supreme
24 Court has interpreted § 1997e(a) as “requir[ing] proper exhaustion,” *Woodford v. Ngo*,
25 548 U.S. 81, 93 (2006), which “demands compliance with an agency’s deadlines and
26 other critical procedural rules.” *Id.* at 90.

27 ¹Because the R&R addresses a dispositive motion, the Court conducts a *de novo*
28 review, not a review under the “clearly erroneous” standard as Defendants argue. (ECF
No. 46 at 2-3.)

1 An inmate's "[f]ailure to exhaust under the PLRA is 'an affirmative defense the
2 defendant must plead and prove.'" *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014)
3 (en banc) (quoting *Jones v. Bock*, 549 U.S. 199, 204, 216 (2007)). Defendants may
4 meet their burden by "prov[ing] that there was an available administrative remedy, and
5 that the prisoner did not exhaust that available remedy." *Id.* at 1172. Once met, the
6 burden shifts to the inmate to show that "there is something in his particular case that
7 made the existing and generally available administrative remedies effectively
8 unavailable to him." *Id.* Defendants, however, retain "the ultimate burden of proof." *Id.*

9 The Supreme Court recently clarified that the only exception to the
10 PLRA's mandatory exhaustion is that an inmate "must exhaust available
11 remedies, but need not exhaust unavailable ones." *Ross v. Blake*, 136 S.Ct. 1850, 1858
12 (2016). In *Ross*, the Court elaborated on this sole exception—when administrative
13 remedies are "unavailable." The Court found three kinds of circumstances where
14 administrative remedies are effectively unavailable. *Id.* at 1859. The first is where the
15 administrative procedure "operates as a simple dead end—with officers unable or
16 consistently unwilling to provide any relief to aggrieved inmates." *Id.* The second is
17 where "an administrative scheme might be so opaque that it becomes, practically
18 speaking, incapable of use. In this situation, some mechanism exists to provide relief,
19 but no ordinary prisoner can discern or navigate it." *Id.* The third circumstances is "when
20 prison administrators thwart inmates from taking advantage of a grievance process
21 through machination, misrepresentation, or intimidation." *Id.* The Ninth Circuit Court of
22 Appeals recently observed that the three circumstances recognized in *Ross* are not an
23 exhaustive list. See *Andres v. Marshall*, No. 15-56057, ___, F.3d ___, 2017 WL 3432609
24 at *2 (9th Cir. Aug. 8, 2017) (finding that administrative remedies were effectively
25 unavailable where defendants failed to timely process plaintiff's timely filed grievance).

26 Plaintiff's main arguments raise issues covered under *Ross*'s second
27 circumstance. Plaintiff challenges the Magistrate Judge's rejection of his argument that
28 AR 740 is ambiguous. (ECF No. 45 at 12-14.) The Magistrate Judge did find that "there

1 is some ambiguity in AR 740 concerning how an inmate is to proceed to exhaust
2 administrative remedies when he receives a response to a grievance that deems the
3 grievance to be an abuse of the grievance procedure and the inmate disagrees with that
4 determination.” (ECF No. 44 at 18.) However, the Magistrate determined that this
5 ambiguity is not enough to render the process effectively unavailable because Plaintiff
6 was advised how NDOC officials interpret the regulation and how Plaintiff was to
7 proceed—file two separate grievances. (*Id.*) The Magistrate Judge found that such
8 interpretation is consistent with how AR 740 addresses grievance that are found to
9 constitute an abuse of the grievance process. (*Id.*)

10 The Court agrees with the Magistrate Judge’s reasoning. Plaintiff’s argument—
11 that AR 740 is ambiguous as to how he should proceed after his grievance was
12 addressed on the merits at the informal level but rejected at the first level as abusing the
13 grievance process—challenges AR 740 as being opaque and difficult to navigate. As the
14 Supreme Court in *Ross* explained, to be “unavailable,” the remedy has to be “essentially
15 ‘unknowable’—so that no ordinary prisoner can make sense of what it demands.” Thus,
16 even accepting Plaintiff’s argument that AR 740 is not clear as to how he should proceed
17 after his grievance was rejected at the first level as being procedurally improper, that
18 alone does not necessarily render the procedure unavailable to him. The Supreme Court
19 in *Ross* anticipated this situation and made it clear that “[w]hen an administrative
20 process is susceptible of multiple reasonable interpretations, . . . the inmate should err
21 on the side of exhaustion.” *Ross*, 136 S.Ct. at 1859. Plaintiff cannot claim that he erred
22 on the side of exhaustion. Even viewing the evidence in the light most favorable to
23 Plaintiff and accepting his contention that AR 740.09 is ambiguous, he was told each
24 time at the first and second level grievance as to how to correct the procedural defect—
25 separate the grievance into two grievances. (ECF No. 23-1 at 2; ECF No. 37 at 52.) He
26 chose not to do so and thus under *Ross*, Plaintiff cannot claim that the administrative
27 remedies were unavailable to him.

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1 Plaintiff also contends that because NDOC officials addressed his informal
2 grievance on the merits only to reject his grievance on procedural grounds at the first
3 and second levels, they rendered the grievance process effectively unavailable to him.
4 (ECF No. 45 at 8-11.) The Court disagrees. In *Reyes v. Smith*, 810 F.3d 654, 659 (9th Cir.
5 2016), the Ninth Circuit held “that a prisoner exhausts such administrative remedies as
6 are available,’ 42 U.S.C. § 1997e(a), under the PLRA despite failing to comply with a
7 procedural rule if prison officials ignore the procedural problem and render a decision on
8 the merits of the grievance at each available step of the administrative process.” In
9 *Reyes*, the inmate plaintiff grieved the reduction of pain medication for his degenerative
10 spine condition. *Id.* at 656. His grievance did not include the names of the physicians
11 who would not approve the pain medication prescriptions originally recommended for
12 plaintiff as required under the prison’s administrative rules. *Id.* Despite such procedural
13 defect, prison officials responded on the merits to the plaintiff’s grievance at all three
14 levels of the administrative grievance process, explaining the reason for the reduction of
15 plaintiff’s pain medication regiment. *Id.* The denial at the final level of the grievance
16 process stated: “This decision exhausts your available administrative remedies.” *Id.* The
17 Ninth Circuit found that the inmate exhausted his available remedies even though his
18 grievances failed to comply with administrative rules because officials provided “a
19 decision on the merits at every level of the grievance process.” *Id.* at 65. The court
20 reasoned that “when prison officials address the merits of a prisoner’s grievance instead
21 of enforcing a procedural bar, the state’s interests in administrative exhaustion [that
22 being the chance to address inmate complaints internally first] have been served.” *Id.*

23 Unlike the situation in *Reyes*, Plaintiff’s grievance was addressed on the merits at
24 only the informal level, but was denied for being procedurally defective at the first and
25 second levels. Thus, while NDOC officials ignored a procedural defect at the informal
26 level, they directed plaintiff to correct the defect at the first and second levels and did not
27 address his grievance on the merits. Plaintiff argues that he did comply with AR 740 by
28 appealing the denial of his grievance at the first and second levels and therefore he

1 “reached the merits of the issues.” (ECF No. 45 at 11.) However, the merits of his claim
2 that he was denied Hepatitis C pill and surgery for his hernia was only addressed at the
3 informal level. Moreover, AR 740 does not provide for an appeal of the finding that the
4 grievance “contains more than one appropriate issue.” While AR 740 does not
5 specifically identify what an inmate is to do in that situation,² NDOC officials’ responses
6 to Plaintiff’s grievance at the first and second levels did instruct Plaintiff on what to do to
7 correct the procedural defect—separate the grievance into two separate grievances to
8 separately address each issue. (ECF No. 23-1 at 2; ECF No. 37 at 52.) Under these
9 circumstances, the Court cannot find that Plaintiff’s grievance was addressed at all levels
10 of the grievance process such that the state’s interest in administrative exhaustion has
11 been served.

12 Plaintiff also argues that NDOC officials improperly screened his grievance at the
13 first and second levels because the directive for him to split up the two issues—Hepatitis
14 C treatment pill and surgery for his hernia—contradicts AR 740.09. In *Sapp v. Kimbrell*,
15 623 F.3d 813, 823 (9th Cir. 2010), the Ninth Circuit reiterated that an improper screening
16 of an inmate’s grievance could render the administrative remedy “effectively
17 unavailable.” There, the court reasoned that a prison appropriately screened out an
18 inmate’s grievances for procedural problems five times. *Id.* at 826-27. The procedural
19 deficiencies included raising a new issue in a second-level grievance, failing to note a
20 specific remedy, failing to attach a requisite health care form, and untimely appealing
21 a lower-level grievance. *Id.* at 825-26. The inmate also received instructions to raise
22 new issues in a separate grievance, to state specific remedies, and to provide the
23 prison with the appropriate medical form. *Id.* Because each screening was
24 supported by grievance regulations, and because the inmate had received
25 appropriate instructions to fix these procedural problems, the court concluded that the
26 inmate was required to exhaust his remedies. *Id.* at 827.

27 ²As noted, the Magistrate Judge found that this created some ambiguity. (ECF
28 No. 44 at 18.)

1 Similarly here, Plaintiff was given proper instructions on the need to separate his
2 single grievance into two. (ECF No. 37 at 52; ECF No. 23-1 at 2-3.) Plaintiff has not
3 shown that he cannot pursue the necessary sequence of appeals even if his grievance
4 was improperly screened at the first and second levels as containing two separate
5 issues because he was instructed what to do.

6 Proper exhaustion requires “a grievant [to] use all steps the prison holds out,
7 enabling the prison to reach the merits of the issue.” *Griffin v. Arpaio*, 557 F.3d 1117,
8 1119 (9th Cir. 2009). The Magistrate Judge correctly found that Plaintiff did not use all
9 steps available to him. Accordingly, the Court will adopt the R&R.

10 **V. CONCLUSION**


11 The Court notes that the parties made several arguments and cited to several
12 cases not discussed above. The Court has reviewed these arguments and cases and
13 determines that they do not warrant discussion as they do not affect the outcome of
14 Defendant’s Motions or Plaintiff’s objection to the R&R.

15 It is therefore ordered, adjudged and decreed that the Report and
16 Recommendation of Magistrate Judge William G. Cobb (ECF No. 44) is accepted and
17 adopted in full.

18 It is further ordered that Defendants’ motion to dismiss/motion for summary
19 judgment (ECF Nos. 23, 24) are granted. Plaintiff’s claim is dismissed with prejudice.

20 The Clerk is directed to enter judgment accordingly and close this case.

21 DATED THIS 14th day of August 2017.

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25 MIRANDA M. DU
26 UNITED STATES DISTRICT JUDGE
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